

STATE OF MICHIGAN
COURT OF APPEALS

RUBY BAKER, Personal Representative of the
ESTATE OF STACEY BAKER,

UNPUBLISHED
January 23, 2007

Plaintiff-Appellant,

v

ST. JOHN HEALTH SYSTEMS a/k/a ST. JOHN
HOSPITAL & MEDICAL CENTER, DR.
THERESE ROTH, and DR. MARSON MA, JR.,

No. 267284
Wayne Circuit Court
LC No. 03-340451-NH

Defendants-Appellees.

Before: Meter, P.J., and O'Connell and Davis, JJ.

METER, J. (*concurring*).

I concur in the result reached by the majority but write separately to address two concerns. First, I am not convinced at this point to join in the conclusion that the pertinent analysis provided by the majority in *Fulton v Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), leads to anomalous results. Second, I note that the absence from the record of the affidavit mentioned by defendants on appeal is not necessarily dispositive in this case. Indeed, it appears (based on representations made by defendants in their appellate brief and by plaintiff in her motion for rehearing in the lower court) that the parties *agree* that the testimony contained in this affidavit (1) was indeed a part of the lower-court record and (2) contained an admission by Dr. Blue that plaintiff's chance of survival without treatment was "5% or less."

Nonetheless, I remain with the majority's ultimate conclusion to reverse and remand. Even if one accepts the parties' representations and assumes that Dr. Blue stated that plaintiff's chance of survival without treatment was 5% or less, the statement does not demonstrate that this case fails to satisfy the pertinent requirement of MCL 600.2912a(2), as interpreted by *Fulton*, *supra* at 84, and *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 538 n 13, 539; 687 NW2d 143 (2004) (analyzing *Fulton* and explaining that it is a binding decision). Dr. Blue's addition of the phrase "or less" indicated that the chance of survival without treatment could have been as low as, for example, .5%. If one uses the *Fulton* "formula" and subtracts .5% from the 51% percent "probability that the outcome might have been different [without treatment]" that was identified by Dr. Blue, then the pertinent requirement of MCL 600.2912a(2) is satisfied.

Given the circumstances, I concur in the result reached by the majority.

/s/ Patrick M. Meter